Supreme Court, U.S.
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No. 061065

In the
# Supreme Court of the United States

BERLE E. GABBARD,
*Petitioner*,

v.

FIRST TENNESSEE BANK, and CITY OF KNOXVILLE; JOHN DOES (Six Unkown Officers of the Knoxville City Police Department); UNIVERSITY OF TENNESSEE MEDICAL CENTER (Psychological Division); JANE DOE (An Employee of the U.T. Medical Center's Psychological Division),
*Respondents*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

### I

WHETHER, CONTRARY TO THE U.S. CONSTITUTION AND THE STANDARD SET FORTH IN ADICKES, THE PANEL FOR THE U.S. SIXTH CIRCUIT COURT OF APPEALS AND THE U.S. DISTRICT COURT BELOW HAVE DEPARTED FROM THE WELL-FOUNDED JURISPRUDENCE OF THEU.S. SUPREME COURT, ADOPTED AND APPLIED BY THE SIXTH CIRCUIT AND OTHER FEDERAL CIRCUITS, TO CREATE A SIGNIFICANTLY HIGHER STANDARD OF PROOF THAT A PRIVATE PARTY ACTING IN CONCERT WITH STATE OFFICIALS IS ACTING UNDER COLOR OF LAW?

### II

WHETHER, CONTRARY TO THE U.S. CONSTITUTION AND THE STANDARD SET FORTH IN ADICKES, THE PANEL FOR THE U.S. SIXTH CIRCUIT COURT OF APPEALS AND THE U.S. DISTRICT COURT BELOW HAVE ARBITRARILY DETERMINED THAT, DESPITE THE RESPONDENT BANK'S PRECISE URGINGS THAT POLICE UNLAWFULLY DETAIN AND SUBJECT THE PETITIONER TO UNWANTED PSYCHOLOGICAL AND PHARMACOLOGICAL EVALUATION, THE RESULTING FORCED DETENTION AND EVALUATIONS DID NOT CAST THE RESPONDENT BANK'S ACTIONS UNDER COLOR OF LAW?

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A copy of the U.S. Sixth Circuit Court's Order of October 30, 2006, affirming the dismissal as to the Respondent Bank is attached at Appendix A; the March 31, 2006 Final Judgment Order of Hon. Thomas W. Phillips, U.S. District Judge, Eastern District of Tennessee, Knoxville Division, denying and dismissing with prejudice Petitioner's motions: (1) for new trial; (2) for leave to amend Complaint, and dismissing the Complaint as to the Respondent First Tennessee Bank (Civil Action No. 3:05-CV-114), is attached at Appendix B.

## JURISDICTION

The Order of the U.S. Sixth Circuit Court of Appeals, affirming dismissal of the Respondent Bank was entered October 30, 2006, and the mandate issued November 21, 2006. Petitioner's petition for rehearing and/or rehearing en banc was dismissed on November 22, 2006 as having been submitted untimely, and Petitioner's subsequent motion challenging the calculation of time was turned away by the Chief Deputy Clerk on December 6, 2006. Jurisdiction for the petition for writ of certiorari is conferred pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Amendments IV, V and XIV of the Constitution of the United States, guaranteeing, respectively, security from unreasonable searches and seizures; no deprivation of life, liberty or property without due process of law; no State deprivation of life, liberty or property without due process nor any denial of equal protections of the laws:

'ENDMENT IV

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated....

AMENDMENT V

> No person shall be...deprived of life, liberty, or property, without due process of law....

AMENDMENT XIV, §1

> No State shall...deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protections of the laws.

This case also involves Article 1, Section 8 of the Tennessee Constitution, guaranteeing that no man be deprived of life, liberty or property, except by judgment of his peers or the law of the land:

ARTICLE 1, §8:

> ...no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers, or the law of the land.

The provisions of Amendments IV, V and XIV are enforced, in pertinent part, by 42 U.S.C. §1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding....

## STATEMENT OF THE CASE

On or about July 16, 2004, the Petitioner, a Knoxville businessman, entered the First Tennessee Bank (the Bank). Intent upon securing several thousand dollars in cash, the Petitioner presented his First Tennessee "First Resource" business card to Ms. Linda Boyd, an officer of the Bank through whom the Petitioner had transacted much of his business over the years.

Upon being told that the Bank could not comply with his request, the Petitioner stated that there was nothing wrong with the card, explaining that he had paid $50.00 to extend the life of his previous card from its 2003 expiration date to the 2006 expiration date of the card in question.[1]

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[1] The card was perfectly valid and on July 24, 2004, the Petitioner would receive $10,000.00 on the card from the Cumberland Valley National Bank, in Corbin, Kentucky. Moreover, the Petitioner was later informed that the error had been in the Bank's computer.

Ms. Boyd went to check the card again, and the Petitioner, knowing that he had other valid credit cards in a small canvas bag, stepped out to his car to retrieve the bag. Upon returning inside the Bank, the Petitioner was searching through the bag when at least two officers of the Knoxville Police Department arrived, supported by an ambulance and its crew.

The police and ambulance had been summoned by Bank officials who, although not directly involved with the Petitioner's transaction, had, apparently, grossly misjudged that the Petitioner was deranged or a substance abuser and had urged police officials and/or City of Knoxville officials that the Petitioner be detained and subjected to psychological and/or pharmacological evaluation.

The Petitioner quickly explained that he was searching through his business and credit cards, but the younger of the two officers continued to approach in a manner indicating an intent to restrain the Petitioner.

The Petitioner stated to the officers that he was trying to protect their jobs and pointed out that there was absolutely no reason to take him into custody. Those remarks seemed to register with the older of the two officers who called off the younger officer, saying to him "he's right."

Momentarily uncertain about how to resolve the matter, the police officers were urged by the Bank to detain the Petitioner for substance testing or other evaluation, and soon both the police officers and the Bank officials were expressing the unified conviction that the Petitioner should be detained.

The Petitioner voiced his objection for the record. However, the Petitioner realized that, at the urgings of the

Bank, the debate had shifted against him and fearing that the police were about to arrest him, the Petitioner stated that he would go to a medical facility to establish that he was not abusing drugs or alcohol.

The ambulance and its crew had arrived on the scene immediately with and in support of the two police officers, and after turning over certain of his personal properties to the older officer for safe keeping, the Petitioner walked aboard the waiting ambulance.

Although no formal complaint was ever filed and the Petitioner was never arrested, read his Miranda rights, hand-cuffed nor restrained by the two police officers or the ambulance personnel, the Petitioner had nonetheless been under de facto detention from the moment the police confronted him, and the Petitioner was never told that he was free to leave.

The Bank never urged the police to escort the Petitioner off the Bank's property nor accused him of any specific violation. Although, in the absence of discovery, conversations between the Bank and other Defendants remain unclear, the Bank had strenuously urged that the Petitioner be detained and subjected to pharmacological and/or psychological testing.

Once inside the ambulance, the Petitioner was driven directly to the Psychological Department of the University of Tennessee Medical Center where the Defendant John Does, Six Unknown Officers of the Knoxville Police Department, were waiting when the Petitioner emerged from the ambulance.

The Defendant Police Officers crowded around the Petitioner, physically restricting his movement, and as he walked directly to the nearest men's rest room, the Defendant Police Officers closed in to block the door.

As the Petitioner stood before a urinal relieving his bladder, a young, female employee (Jane Doe) of the Defendant University of Tennessee Medical Center (Psychological Division) entered the rest room and, slipping up behind the Petitioner with a cup in one hand, thrust her arm between the Petitioner's legs in an effort to secure a urine sample.

With the Defendant Six Unknown Police Officers crowding around to block and control his movement, the Petitioner was then herded to an area where Defendant Jane Doe and other staff persons of the Defendant Hospital's Psychological Department announced their intention to perform unspecified tests on the Petitioner.

The Petitioner thereupon stated "I don't want any tests" and asked "Do I still have to do it?" When the Defendant Hospital's staff and the Defendant Police Officers answered "yeah," the Petitioner again stated, "Make it a matter of record that I refuse this. Do I still have to do this?"

When again the answer was "yeah," the Petitioner, unwilling to risk physical injury in a futile struggle, opened his arms in a gesture of resignation and surrender.

The Petitioner was thereupon strapped down to a hospital bed with both arms tightly secured and injected with unknown drugs that rendered the Petitioner unconscious.

Without a formal complaint, arrest, warrant of arrest, court order, consent by the Petitioner or any relative, the Defendants committed the Petitioner to The Defendant Hospital's Psychological Department, solely upon the urgings of the Bank.

Lacking knowledge of the Petitioner's state of health and/or his tolerance or lack of tolerance for specific drugs, substances and treatments, The Defendant Hospital's Psychological Department subjected the plaintiff to some seven (7) days of experimental treatment, using unknown drugs and unspecified tests against the Petitioner's expressed will.

Throughout the seven days of his forced detention, the Petitioner was isolated in an intensive-care section of the Psychological Ward and kept under 24-hour surveillance.

During the first day of detention, the Defendant Hospital apparently performed a spinal tap, drawing spinal fluid from the Petitioner, and in addition to the catheter invading the Petitioner's bladder, unknown drugs were being administered, not only by IV, but via needles inserted directly into the Petitioner's belly and stomach.

Upon awakening, the Petitioner had little or no awareness of himself, his location and his condition for some two or three days, but when Petitioner's awareness returned, he discovered that his feet and legs were grotesquely swollen. That swelling persisted for several months and continues to recur to this very day.

Stripped of his Constitutional rights and deprived of all access to the courts of the United States and the State of Tennessee, the Petitioner had no way of knowing when, if

ever, the Defendants would release him and was forced to conceal the horrible swelling that had bloated his legs and feet to almost twice their size.

Feigning that he was much improved and that he had never felt better in his life, the Petitioner was discharged from the Defendant Hospital on July 23, 2004. Shortly after his discharge, the Petitioner passed out and was unconscious for some seven hours. Blackouts, episodes of temporary blindness, back pains, severe weakness, symptoms closely mimicking muscular dystrophy, severe pain in the lower legs and feet, as well as lingering humiliation, anger and fear have persisted.

On or about March 2, 2005, the Petitioner filed his civil Complaint before the United States District Court, Eastern District of Tennessee, Knoxville Division. Appendix H.

On or about March 22, 2005, the Respondent Bank filed its Motion to Dismiss for Failure to State a Claim with Memorandum. The Petitioner received no service of the Respondent Bank's motion, and on or about May 3, 2005, the U.S. District Court below entered its Order to Show Cause why the action should not be dismissed as against the Bank owing to failure of the Petitioner to prosecute the action.

On or about May 16, 2005, the Petitioner filed his Response to Order to Show Cause with Memorandum and Affidavit. On or about November 4, 2005, the U.S. District Court entered its Memorandum Opinion and Order dismissing the action as to the Respondent Bank. Appendix C.

On or about November 14, 2005, the Petitioner filed a Motion for New Trial (as to the Respondent Bank) with Memorandum. and moved for leave to Amend the Complaint.

On or about November 16, 2005, the Respondent Bank tendered its Response and Motion for Entry of Judgment with Memorandum. On or about November 28, 2005, the Petitioner tendered his Response Memorandum to the Defendant Bank's Motion for Entry of Judgment.

On or about March 31, 2006, the U.S. District Court entered a Memorandum and Order and a Final Judgment Order in which the Court Denied the Petitioner's motions to reconsider and to amend the Complaint, Granted the Respondent Bank's motion for entry of a judgment order and Entered the Final Judgment Order dismissing the Respondent Bank from this action. Appendix B.

On or about April 7, 2006, the Petitioner filed his Notice of Appeal. Appendix D.

On or about October 30, 2006, the Sixth Circuit Court of Appeals Affirmed the Final Judgment Order of the U.S. District Court. Appendix A.

The Petitioner thereupon tendered to the Sixth Circuit Court a petition for rehearing and/or rehearing en banc. On November 21, 2006, however, the Mandate of the Sixth Circuit Court issued. Appendix E.

On November 22, the day following the issuance of the Mandate, the Clerk of the Sixth Circuit Court apprised the Petitioner that his petition for rehearing, etc., had been received on November 16, 2006 and that said petition had been untimely under F.R.A.P., Rule 40(a)(1). Appendix F.

The Petitioner, arguing that his petition was timely under the time computation set forth in F.R.A.P., Rule 26(c),

thereupon moved the Court for relief from its Mandate and from failure to file the Petition.

On December 6, 2006, the Clerk of the Sixth Circuit Court apprised the Petitioner that his only recourse is to proceed to the U.S. Supreme Court on a petition for writ of certiorari. Appendix G.

## ARGUMENTS IN SUPPORT OF GRANTING CERTIORARI

I. CONTRARY TO THE U.S. CONSTITUTION AND THE STANDARD SET FORTH IN ADICKES, THE PANEL FOR THE U.S. SIXTH CIRCUIT COURT OF APPEALS AND THE U.S. DISTRICT COURT BELOW HAVE DEPARTED FROM THE WELL-FOUNDED JURISPRUDENCE ESTABLISHED BY THE U.S. SUPREME COURT, ADOPTED AND APPLIED BY THE SIXTH CIRCUIT AND OTHER FEDERAL CIRCUITS, TO CREATE A SIGNIFICANTLY HIGHER STANDARD OF PROOF THAT A PRIVATE PARTY ACTING IN CONCERT WITH STATE OFFICIALS IS ACTING UNDER COLOR OF LAW

Behind the cover of its **not-recommended-for-full-text-publication** Opinion, the judicial panel of the Sixth Circuit Court, although citing Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970), has obliquely challenged and negated the well-settled holdings set forth in Adickes that:

> The involvement of a policeman, a state official, whether or not his actions were lawful or authorized, in the alleged conspiracy would provide the state action needed to show a direct violation of petitioner's

> Fourteenth Amendment rights entitling her to relief under 1983, and private persons involved in such a conspiracy are acting "under color" of law and can be liable under 1983. Pp. 150 - 152. (Emphasis added).

In Adickes, employees of the H. S. Kress Company allegedly acted under color of law with Hattiesburg Mississippi police officers to deny service to Adickes (a White teacher who entered the diner with six (6) Black students). As alleged, Kress employees combined with the police to deny service to Ms. Adickes and to effect her arrest once she left the restaurant.

Unlike the facts of the instant case, there was no direct evidence in Adickes of any communications between any Kress employee and the police. Indeed, Kress produced affidavits from the chief of police and two (2) arresting officers that the store manager (Powell) had not requested that Ms. Adickes be arrested. Kress also relied on Adickes's own admissions (in her deposition) that she had no knowledge of any communications between Kress employees and the police and that she was relying solely on circumstantial evidence.

In the instant case the evidence is clear and undisputed that the Respondent Bank communicated with the police and/or other Defendants; that the Respondent Bank made an arbitrary and unsupported judgment that the Petitioner required detention and psychological and/or pharmacological evaluation; that based on communications with the Respondent Bank, two (2) police officers were dispatched to the Bank along with an ambulance and crew--to transport the Petitioner to the psychological ward for the psychological and/or pharmacological evaluations requested by the Respondent Bank.

In Adickes, the store manager for the H. S. Kress Company attempted to put a favorable spin on events by acknowledging that he signaled an employee that Ms. Adickes was not to be served. He insisted, however, that his decision had nothing to do with any conspiracy to discriminate against Adickes, but was an attempt to prevent a riot by other patrons who may have become incensed by sight of a White woman being served while in the company of Blacks.

As in the instant case, the district court dismissed Adickes's claim that Kress acted in combination with the Hattiesburg police under color of law, insisting that she had **alleged no facts from which a conspiracy might be inferred**. Similarly too, the appellate court affirmed that judgment. However, the U.S. Supreme Court didn't buy the Kress argument that its employees were acting as good stewards of interracial relations.

Neither should this Court buy the Respondent Bank's explanation that it was acting as the champion of Petitioner's mental, moral or physical health.

The Court, pursuant to FRE, Rule 201(d) is asked to take judicial notice that while, after almost two (2) years, there has been no discovery in this case, there is and can be nothing in the record remotely supportive of the Respondent Bank's unqualified diagnosis. The Respondent Bank knew, rather, that Petitioner's bank card was valid for tens of thousands of dollars. However, while the card was being processed again, the Petitioner retrieved a bag from his car that contained other

valid cards. Almost certainly this was no reasoned basis for the Bank's arbitrary conclusion.[2]

Although the proof in Adickes was wholly circumstantial, the U.S. Supreme Court held that, on the mere possibility that a policeman was present, **it would be open to a jury, in light of the sequence that followed, to infer from the circumstances that the policeman and a Kress employee had a "meeting of the minds" and thus reached an understanding**. (My emphasis).

It is an absolute certainty in the instant case that the Respondent Bank and the Knoxville police **communicated** and that they reached a "meeting of the minds" that the Appellant be detained and subjected to psychological and substance evaluation--**an agreement utterly void of legal authority**.

It is, moreover, judicially admitted in the case sub judice that the Respondent Bank never filed a formal "complaint." It is further judicially admitted that the Petitioner was never "arrested." If the Petitioner was not lawfully arrested, then he was **unlawfully kidnapped** for some seven (7) days. Clearly, the informal resolution sought by the Bank was illegal.

It was, therefore, an abrogation and abandonment of well-settled principles and precedents and an abuse of **unpublished cases** for the judicial panel of the Sixth Circuit to hold the Petitioner to a more stringent standard of proof that the

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[2] Petitioner's denial of contracted services was subsequent charged to computer malfunctions, but it seems more likely that there were irregularities in the Bank that day that a substantial withdrawal might have exposed or exasperated.

Respondent Bank, a private party, acted under color of law, than that required in other federal cases. Adickes, supra; Chapman v. Higbee Co., 319 F. 3d 825 (6th Cir. 2003); Collins v. Womancare, 878 F.2d 1145 (9th Cir. 1989); Flint v. Kentucky Dept. of Corr., 270 F.3d 348 6th Cir. 2001); Hooks v. Hooks, 771 F.2d 935 (6th Cir. 1985); Lugar v. Edmonson Oil Co., 457 U.S. 922 (1982); Romanski v. Detroit Entertainment, LLC, F3d. (No. 04-1354 6th Cir. 2005); 42 U.S.C. § 1983; Amends. 4, 5 and 14, U.S. Const.; Article I, § 8, Tenn. Const.

II. CONTRARY TO THE U.S. CONSTITUTION AND THE STANDARD SET FORTH IN ADICKES, THE PANEL FOR THE U.S. SIXTH CIRCUIT COURT OF APPEALS AND THE U.S. DISTRICT COURT BELOW HAVE ARBITRARILY DETERMINED THAT, DESPITE THE RESPONDENT BANK'S PRECISE URGINGS THAT POLICE UNLAWFULLY DETAIN AND SUBJECT THE PETITIONER TO UNWANTED PSYCHOLOGICAL AND/OR PHARMACOLOGICAL EVALUATION, THE RESULTING FORCED DETENTION AND EVALUATIONS DID NOT CAST THE RESPONDENT BANK'S ACTIONS UNDER COLOR OF LAW

As the U.S. Sixth Circuit Court aptly noted in the case of United States v. Anderson, 352 F.2d 500 (6th Cir. 1965), "...conspiracy is provable upon clear inferences which can be derived from a collocation of circumstances and events."

Owing precisely to the urgings of the Bank, the Petitioner was subjected to seven (7) days of detention and experimentation in a mental institution. Therefore, both the actus reus and the mens rea of conspiracy are readily apparent

in the Respondent Bank's persistent urgings that state authorities commit the illegal acts of detaining and subjecting the Petitioner to chemical and/or psychological evaluations against his expressed will and without resort to due process.

As previously noted in Adickes, supra, the facts creating a nexus between the private party (S. H. Kress & Company) and the Hattiesburg Police were almost nonexistent. Nevertheless, the U.S. Supreme Court determined, solely on circumstantial evidence, that the indicia was sufficient for a jury to determine that S. H. Kress employees conspired with local police to deny service to Ms. Adickes and/or to subject her to unlawful arrest once she left the store.

In the instant case it is well established that (1) there were both telephonic and parol communications between the Respondent Bank and the City of Knoxville Police; that (2) the Bank urged that this Petitioner be detained and subjected to psychological and/or substance-abuse evaluation; that (3) for the precise purpose of transporting the Petitioner to a mental institution, an ambulance and crew along with two (2) police officers were dispatched to the site of the Bank; that (4) several additional police officers were dispatched to the Defendant University of Tennessee Medical Center's Psychological Division; that (5) once the Petitioner, protesting against detention, proved that his canvas bag contained no threat, the Bank continued to urge and voice agreement with the two (2) policemen that the Petitioner be detained and evaluated.

Again, the Court is directed to Adickes, supra and its holding that **the mere involvement of police, whether or not his (police's) actions were lawful or authorized, in the alleged conspiracy, would provide the state action needed**

**to show a direct violation of petitioner's Fourteenth Amendment rights ....**

Without a warrant, without an order from a magistrate or judge, without a wink or a nod towards due process, the Respondent Bank and its co-Defendants conspired to strip the Petitioner of his dignity and liberty and place him in a mental institution.

In invoking the precise **state action** taken by the police and other Defendants, the Respondent Bank acted in concert with the police under **color of law**, and neither the Respondent Bank nor police authorities can avoid Section 1983 sanctions when they "can show no authority" for their actions. Lugar, supra.

The judicial panel for the Sixth Circuit Court and the U.S. District Court below were under self-professed obligation to accept as true the foregoing facts and all clear inferences derived therefrom and to construe them liberally in favor of this Appellant. Miller v. Currie, 50 F.3d 373 (6th Cir. 1995); United States v. Anderson supra;

The panel of the U.S. Sixth Circuit Court of Appeals and the U.S. District Court below committed plain error in failing to accept as true all factual averments and to construe clear inferences in Petitioner's favor. Lugar; Miller; U.S. v. Anderson, supra; 42 U.S.C. § 1983; Amends. 4, 5 and 14, U.S. Const.; Article I, § 8, Tenn. Const.

## CONCLUSION

WHEREFORE, in light of the glaring departures from well-established state-action jurisprudence, certiorari is necessary to reassert this Court's sovereignty, to ensure uniformity among the Federal circuits and to curb the abuses apparent in this not-recommended-for-full-text-publication Opinion, and the Petitioner prays the U.S. Supreme Court for all just relief.

Respectfully submitted,

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PLAINTIFF-PETITIONER, pro se

## APPENDIX A

## UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

**No. 06-5529**

**[Filed October 30, 2006]**

BERLE E. GABBARD,
Plaintiff-Appellant,

v.

FIRST TENNESSEE BANK,
Defendant-Appellee,

CITY OF KNOXVILLE; JOHN DOES,
6 unknown officers of the Knoxville
City Police Department;
UNIVERSITY OF TENNESSEE
MEDICAL CENTER, Psychological Division,
Defendants.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE**

## ORDER

Before MARTIN and COOK, Circuit Judges; BERTELSMAN, District Judge.*

Berle E. Gabbard, a pro se Tennessee resident, appeals a district court judgment dismissing his civil rights complaint filed pursuant to 42 U.S.C. §1983. This case has been referred to a panel of the court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Seeking monetary and declaratory relief, Gabbard sued First Tennessee Bank; the City of Knoxville, Tennessee; police officers of the Knoxville police department; the University of Tennessee Medical Center; and an unknown employee of the medical center. In July 2004, Gabbard entered First Tennessee Bank to withdraw several thousand dollars. To make the withdrawal, he presented his "First Resource" business card to a bank employee. When he was informed by the bank that he could not complete his request with that card, Gabbard went to his car to retrieve a canvas bag which contained additional credit cards. Upon returning to the bank, Gabbard was searching through his bag when he was approached by two Knoxville police officers. Gabbard alleged that the police were called by bank employees who were not directly involved with his transaction and "had grossly misjudged the situation and overreacted to it." Gabbard alleged that the police and bank employees expressed

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* The Honorable William O. Bertelsman, United States District Judge for the Eastern District of Kentucky, sitting by designation.

their concern about detaining Gabbard for substance testing or further mental evaluation. Gabbard objected to the evaluation, but voluntarily went to the hospital for observation so as to resolve the matter. Gabbard stated that he was detained against his will at the medical center and was subjected to medical testing and experimental treatment in violation of his constitutional rights.

The district court dismissed the complaint against the bank pursuant to Fed. R. Cir. P. 12(b)(6) for failure to state a claim. Gabbard has only appealed the district court's dismissal of his allegations against the bank. Therefore, the bank is the only proper party before the court.

In his timely appeal, Gabbard argues that the district court erred in dismissing his complaint against the bank. He also asserts that the district court erred by not allowing him to amend his complaint.

Gabbard's complaint was dismissed pursuant to Rule 12(b)(6) because the district court determined that Gabbard had failed to state a claim upon which relief can be granted. The court conducts de novo review of a dismissal under Rule 12(b)(6). *Ziegler v. IBP Hog Mkt., Inc.*, 249 F.3d 509, 511-12 (6th Cir. 2001). In reviewing the motion, the court construes the complaint in the light most favorable to the plaintiff, accepts all the factual allegations as true, and determines whether the plaintiffcan undoubtedly prove no set of facts in support of his claim that would entitle him to relief. *Id.* at 512. The court need not a.eeept as true legal conclusions or unwarranted factual inferences. *Morgan v. Church's Fried Chicken,* 829 F.2d 10, 12 (6thCir. 1987).

The district court properly dismissed Gabbard's complaint against the bank, as he failed to establish that the bank was

acting under color of state law. To state a claim under §1983, a plaintiff must allege two elements: 1) the defendant was acting under color of state law, and 2) the offending conduct deprived the plaintiff of rights secured under federal law. *Mezibov v. Allen,* 411 F.3d 712, 716-17 (6th Cir. 2005), *cert. denied,* 126 S. Ct, 1911 (2006). To satisfy the color-of-state-law requirement, the bank's action must be fairly attributable to the state. *Rendell-Baker v. Kohn,* 457 U,S. 830, 838 (1982). Although private parties may jointly engage with state actors in prohibited activities which can be deemed acts under color of state law, *Adickes v. S. H. Kress & Co.,* 398 U.S. 144, 152 (1970), complaints by citizens to the police are insufficient to convert the private party into a state actor. *Collins v. Womancare,* 878 F.2d 1145, 1155 (9th Cir. 1989).

The facts establish that the bank employees called the police as they were concerned that Gabbard's behavior indicated that he was under the influence of drugs or suffered from a mental impairment. The fact that the bank employees called the police out of concern due to Gabbard's behavior does not make the activities of the bank employees attributable to the state. *Rendell-Baker,* 457 U.S. at 838; *Collins,* 878 F.2d at 1155. Therefore, the district court properly dismissed Gabbard's allegations against the bank for failure to state a claim under §1983.

Gabbard also contends that the district court erred by not allowing him to amend his complaint. Gabbard sought to add the following amendment to his complaint: "The Defendant Bank, arbitrarily determining that Plaintiff requireddetention and substance or psychological evaluation, combined with other Defendants to summon police and an ambulance to employee official power in deprivation of Plaintiff's rights." A district court's denial of a motion to amend a complaint is reviewed for an abuse of discretion. *Wade v. Knoxville Utils.*

*Bd.*, 259 F.3d 452, 459 (6th Cir. 2001); *Parry v. Mohawk Motors of Mich., Inc.*, 236 F.3d 299, 306 (6th Cir. 2000). However, when the denial is based upon the district court's legal conclusion that the proposed amendment would be futile, the decision is reviewed de novo. *Wade,* 259 F.3d at 459; *Parry,* 236 F.3d at 306. A reviewing court finds an abuse of discretion when it reaches a firm and definite conviction that the trial court committed a clear error in judgment. *Cincinnati Ins. Co. v. Byers,* 151 F.3d 574, 578-79 (6th Cir. 1998).

After a responsive pleading has been filed, leave to amend must be freely given when justice requires. Fed. R. Civ. P. 15(a), *Foman v. Davis,* 371 U.S. 178, 182 (1962). Nevertheless, leave to amend should be denied if the amendment is brought in bad faith, for dilatory purposes, results in undue delay or prejudice to the party, or would be futile. *Crawfordv. Roane,* 53 F.3d 750, 753 (6th Cir. 1995).

The record shows that the bank moved to dismiss Gabbard's complaint for failure to state a claim on March 22, 2005. Gabbard responded to the motion on May 16, 2005. The district court subsequently granted the bank's motion to dismiss on November 4, 2005. It was not until after the bank was dismissed as a party that Gabbard attempted to amend his complaint on November 14, 2005. The district court denied the motion to amend on March 31, 2006, finding that the amendment was futile. Given that Gabbard had attempted to amend his complaint only after the bank's motion to dismiss was granted, and given that the amendment fails to establish that the bank's actions could be deemed to occur under color of state law, the district court did not err in denying Gabbard's motion to amend his complaint.

Accordingly, we affirm the district court's judgment. Rule 34(j)(2)(C), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

/s/ _____

Leonard Green
Clerk

## APPENDIX B

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF TENNESSEE**
**AT KNOXVILLE**

**No. 3:05-CV-114**
**(Phillips)**

**[Filed March 31, 2006]**

BERLE E. GABBARD, )
Plaintiff, )
)
v. )
)
FIRST TENNESSEE BANK, et al., )
Defendants )
)

### MEMORANDUM AND ORDER

This matter is before the court on the following motions filed by the parties: (1) plaintiff's motion for a scheduling conference [Doc. 17]; (2) plaintiff's motion for reconsideration and motion to amend complaint [Doc. 20]; and (3) defendant First Tennessee Bank's motion for entry of a judgment order [Doc. 23].

I

Plaintiff has moved the court for a scheduling conference pursuant to Rule 26, Federal Rules of Civil Procedure. It appears so the court that the defendants have filed answers to the complaint herein and that a scheduling conference is appropriate. Accordingly, plaintiff's motion [Doc. 17] is **GRANTED**, and the clerk is **DIRECTED** to set this matter for a scheduling conference.

Next, plaintiff has moved the court to reconsider its order dismissing First Tennessee Bank as a defendant in this case, and for leave to amend his complaint [Doc. 20]. Defendant First Tennessee Bank has Bed a response in oppositlon to the motion [Dec. 22].

Plaintiff's complaint alleges that he entered First Tennessee Bank on July 16, 2004 to conduct some personal business, A bank employee called police and expressed concern about plaintiffs mental state. The complaint further states that although plaintiff voiced his objection, he volunteered to be transported to a medical facility. Plaintiff was transported to UT Medical Center, where plaintiff alleges he was subjected to medical tests and experimental treatment in violation of his constitutional rights.

To state a cause of action under 42 U.S.C. §1983, plaintiff must allege the "deprivation of rights secured by the United States Constitution or a federal statute by a person who is acting under color of state law. *Spadafore v. Gardner,* 330 F.3d 849 (6th Cir. 2003). The court dismissed First Tennessee Bank as a defendant in this action because plaintiff's complaint is insufficient, as a matter of law; to establish that the Bank acted under color of law. The only allegation that the Bank had any connection with any

governmental authority is the allegation that employees of the Bank summoned the police to the Bank on July 16, 2004, Federal courts have held that merely complaining to the police does not convert a private party to a state actor. *See Collins v. Womancare*, 878 F.2d 1145, 1154 (11th Cir. 1989); *Lee v. Brown Group Retail, Inc.*, 2003 WL 22466187 (D.Kan. 2003); *Benavidez v. Gunnell,* 722 F.2d 615, 618 (10th Cir. 1983 ); *Butler v. Goldblatt Bros Inc.*, 589 F.2d 323, 327 (7th Cir. 1978). Accordingly, plaintiff's motion for reconsideration [Dec. 20] is without merit and is hereby **DENIED**.

Plaintiff has also moved for leave to amend his complaint to add the following allegation: "The Defendant Bank, arbitrarily determining that Plaintiff required detention and substance or psychological evaluation, combined with other Defendants to summon police and an ambulance to employ official power in deprivation of Plaintiff's rights." Although leave to amend pleadings shall be freely given when justice so requires, F.R.C.P. 15, leave may be denied when the amendment is futile. *Robinson v. Michigan Console Gas Co.,* 918 F.2d 579, 591 (6th Cir. 1990). General a!legations of cooperation between pnvate individuals and government agencies do not make out a claim of action taken under color of law. In particular, the nature of the relationship or cooperation between the state and private parties must be pled in detail. *Glaros v. Perse,* 628 F.2d 679 (1st Cir. 1980); *Colburn v. Upper Darby Township,* 883 F.2d 663 (3rd Cir. 1988).

Plaintiff's complaint contains no facts in support of his allegation that First Tennessee Bank conspired with the other defendants to deprive him of his civil rights. The Bank's complaining about plaintiffs presence to a police officer who, acting within the scope of his statutory duties, detained

plaintiff after questioning him, does not, without more, constitute state action for which the Bank can be held responsible. Plaintiff's proposed amendment fails to state specific facts alleging any further collusion, joint course of action, or other nexus with the police officers to demonstrate that the Bank's employees acted under color of law. Because the court conciudes that the proposed amendment fails to state a cause of action against First Tennessee Bank, the court finds the proposed amendment would be futile. Accordingly, plaintiff's motion to amend complaint [Dec. 20] is **DENIED**.

**III**

Defendant First Tennessee Bank has moved for entry of a judgment order under F.R.C.P. 54(b) [Dec. 23]. Plaintiff opposes the motion [Dec. 25].

> Rule 54(b), Federal Rules of Civil Procedure provides:
>
> When more than one claim for relief is presented in an action ... or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon express determination that there is no just mason for delay and upon an express direction for entry of judgment ....

In the instant case, the court's judgment order dismissing First Tennessee Bank is a final adjudication of the Bank's liability to plaintiff; plaintiff's claims against the Bank are different from his claims against the City of Knoxville and UT Medical Center and dismissal of the Bank would not affect the remaining claims; and entry of a judgment order would promote judicial economy. Accordingly, I find that First

Tennessee Bank is entitled to a judgment order under Rule 54(b) and the Bank's motion [Dec. 23] is hereby GRANTED.

**Conclusion**

For the reasons stated above, plaintiff's motion for a scheduling conference [Doc, 17] is **GRANTED**; plaintiff's motion to reconsider and.motion to amend complaint [Doc. 20] is **DENIED**; and defendant First Tennessee Bank's motion for entry of a judgment order [Doc. 23] is **GRANTED**.

ENTER:

s/ Thomas W. Phillips
United States District. Judge

**IN THE UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF TENNESSEE**
**AT KNOXVILLE**

**No. 3:05-CV-114**
**(Phillips)**

**[Filed March 31, 2006]**

| | |
|---|---|
| BERLE E. GABBARD, | ) |
| Plaintiff, | ) |
| | ) |
| v. | ) |
| | ) |
| FIRST TENNESSEE BANK, et al., | ) |
| Defendants | ) |
| | ) |

**JUDGMENT ORDER**

For the reasons set forth in the memorandum and order filed this day with the clerk, plaintiff's cause of action against First Tennessee Bank is hereby **DISMISSED**. This order constitutes a **FINAL JUDGMENT** as to this defendant, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

IT IS SO ORDERED.

ENTER:

s/ Thomas W. Phillips
United States District. Judge

## APPENDIX C

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF TENNESSEE**
**AT KNOXVILLE**

**No. 3:05-CV-114**
**(Phillips)**

**[Filed November 4, 2005]**

BERLE E. GABBARD,
Plaintiff,

v.

FIRST TENNESSEE BANK, et al.,
Defendants

### MEMORANDUM OPINION

Plaintiff has filed his civil rights action, pursuant to 42 U.S.C. §1983 alleging that defendants violated his constitutional rights when he was unlawfully detained and transported to the University of Tennessee Medical Center for evaluation and medical treatment against his wishes. Defendant First Tennessee Bank (the Bank) has filed a motion to dismiss the claim against it for failure to state a claim upon which relief can be granted. Specifically, the Bank asserts that it is a public corporation with the status of a private citizen and it was not acting under Color of law; thus it may not be

sued for violations of §1983, which expressly requires that the defendant act under color of law. For ths reasons which follow, defendant's motion to dismiss will be granted.

Plaintiff's complaint states that on July 16, 2004, plaintiff entered the Bank to withdraw severat thousand dollars in cash, and presented his "First Resource" business card to a bank employee. Upon being told that the Bank couid not comply with his request, plaintiff stepped out to his car to retrieve a canvas bag which contained other credit cards. Upon returning inside the Bank, plaintiff was searching through his canvas bag when approached by two officers or the Knoxville Police Department. Plaintiff states that the "police had been summoned by employees of the Bank who, not directly involved with the plaintiff's transaction, had grossly misjudged the situation and overreacted to it."

The complaint goes on to state that the police officers and employees of the Bank expressed concern about detaining plaintiff for substance testing or other evaluation. Plaintiff voiced his objection, but volunteered to go to a medical facility for evaluation in order to resolve the matter peaceably. Plaintiff walked aboard a waiting ambulance and was transported to the University of Tennessee Medical Center. The complaint alleges that plaintiff was detained against his will at UT Medical Center and subjected to medical tests and experimental treatment in violation of his constitutional rights.

The Bank has moved for dismissal of plaintiff's claims against it for failure to properly plead state action, or action under color of law, as required for claims under 42 U.S.C. §1983.

**Analysis**

A motion to dismiss under Rule 12(b)(6), Federal Rules of Civil Procedure, requires the court to construe the complaint in the light most favorable to the plaintiff, accept all the complaint's factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of his claims that would entitle him to relief. *Meador v. Cabinet for Human Resources*, 902 F.2d 474, 475 (6th Cir.) *cert. denied,* 498 U.S. 867 (1990). The court may not grant such a motion to dismiss based upon a disbelief of a complaint's factual allegations. *Lawler v. Marshall,* 898 F.2d 1198, 1198 (6th Cir. 1990); *Miller v. Currie,* 50 F.3d 373, 377 (6th Cir. 1995) (noting that courts should not weigh evidence or evaluate the credibility of witnesses). The court must liberally construe the complaint in favor of the party opposing the motion. *Id.* However, the complaint must articulate more than a bare assertion of legal conclusions. *Scheid v. Fanny Farmer Candy Shops, Inc.,* 859 F.2d 434 (6th Cir. 1988), "[The] complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory." *Id.*. (citations omitted).

To state a cause of action under 42 U.S.C. §1983, plaintiff must allege the "deprivation of rights secured by the United States Constitution or a federal statue by a person who is acting under color of state law." *Spadafore v. Gardner,* 330 F.3d 849 (6th Cir. 2003). Whether state action is present in a case involving private parties depends on whether the conduct allegedly causing the deprivation of a federal right can be fairly attributable to the state. *Lugar v. Edmondson Oil Co.,* 457 U.S. 922, 937 (1982). Although the court is required to read *pro se* complaints liberally, *(see Haines v. Kerner,* 404 U.S. 519, 520-21 (1972)), a plaintiff must plead

specific facts backing up his claims of civil rights violations. The Bank asserts that it is a public corporation with the status of a private citizen. At the time of the events alleged in the complaint, it was not acting under color of state law; therefore, it cannot be sued for violations of §1983, which expressly requires that a defendant act under color of state law.

Although it is true that private parties jointly engaged with state or local officials in prohibited conduct can be said to act under color of state law, *Adickes v. S.H. Kress & Co.*, 398 U.S. 144,152 (1970), general allegations of cooperation between private individuals and government agencies do not make out a claim of action taken under color ot law. In particular, the nature of the relationship or cooperation between the state and private parties must be pled in detail. *Glaros v. Perse,* 628 F.2d 679 (1st Cir. 1980); *Colburn v. Upper Darby Township,* 883 F.2d 663 (3rd Cir. 1988). The Sixth Circuit has noted that the Supreme Court has developed three tests for determining the existence of state action in a particular case: (1) the public function test, (2) the state compulsion test, and (3} the symbiotic relationship or nexus test. *Romanski v. Detroit Entertainment, LLC.* ____ F.3d __ _, 2005 WL 2811242 (6th Cir. (Mich)) (citations omitted).

In the instant case, the only ailegation that the Bank has any connection with any governmental authority is the allegation that employees of the Bank summoned the police to the Bank on July 16, 2004. That allegation is insufficient, as a matter of law, to establish that the Bank acted under color of law. Federal courts have held that merely complaining to the police does not convert a private party to a state actor. *See Collins v. Womancare,* 878 F.2d 1145, 1154 (11th Cir. 1989); *Lee v. Brown Group Retail, Inc.,* 2003 WL 22466187 (O.Kan. 2003); *Benavidez v. Gunnell,* 722 F.2d 615, 618

(10th Cir. 1983); *Butler v. Goldblatt Bros Inc.*, 589 F.2d 323, 327 (7th Cir. 1978). The Bank's complaining about plaintiff's presence to a police officer who, acting within the scope of his statutory duties, detained plaintiff after questioning him, does not, without more, constitute state action for which the Bank can be held responsible. Plaintiff's complaint fails to state specific facts alleging any further collusion, joint course of action, or other nexus with the police officers to demonstrate that the Bank's employees acted under color of law. Thus, the court concludes that the Bank's actions were not taken under color of law, and plaintiff's §1983 claim must be dismissed against First Tennessee Bank for failing to plead facts sufficient to support a §1983 action against the Bank.

**Conclusion**

For the reasons stated above, the motion to dismiss filed by First Tennessee [Doc. 10] is **GRANTED**, and First Tennessee Bank is hereby **DISMISSED** as a defendant in this action.

**ENTER:**

/s/_____
Thomas W. Phillips
United States District Judge

## APPENDIX D

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF TENNESSEE**
**KNOXVILLE DIVISION**

**Civ. Action No. 3:05-CV-114**

**[Filed April 7, 2006]**

| | |
|---|---|
| BERLE E. GABBARD, Plaintiff, | ) |
| v. | ) |
| FIRST TENNESSEE BANK, et al., Defendants | ) |

## NOTICE OF APPEAL

Comes now the Plaintiff-Appellant, Berle E. Gabbard, *pro se*, and pursuant to Federal rules of Appellate Procedure (FRAP), Rule 3(a) and 4(a), hereby gives notice of his desire to appeal to the U. S. Sixth Circuit Court of Appeals from the Final Judgment entered March 31, 2006 by the United States District Court, dismissing the Plaintiff's causes of action against the Defendant First Tennessee Bank.

Respectfully submitted,

/s/ _____

BERLE E. GABBARD
3920 Chapman Highway
Knoxville, TN 37920
Phone: (228) 369-0904

PLAINTIFF-APPELLANT, *pro se*

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing Notice of Appeal has been served on Counsel for the Defendants by depositing true and correct copies of same in the U.S. Mail, postage prepaid, addressed to Hon. Jay A. Garrison, Holifield & Associates, P.C., 8351 E. Walker Springs Lane, suite 303, Knoxville, TN 37923-3138; Hon. Stephen C. Daves, O'Neil, Parker & Williamson, P.O. Box 217, Knoxville, TN 37901-0217; Hon. Ronald E. Mills, Senior City Attorney, 400 Main Avenue, Suite 699, P.O. Box 1631, Knoxville, TN 37901, this the 7th day of April, 2006.

/s/ _____

BERLE E. GABBARD

## APPENDIX E

## UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

**No. 06-5529**

**[Filed November 21, 2006]**

BERLE E. GABBARD
Plaintiff - Appellant

v.

FIRST TENNESSEE BANK
Defendant - Appellee

CITY OF KNOXVILLE; JOHN DOES,
6 unknown officers of the Knoxville City Police
Department; UNIVERSITY OF TENNESSEE
MEDICAL CENTER, Psychological Division
Defendants

**MANDATE**

Pursuant to the court's disposition that was filed 10/30/2006, the mandate for this case hereby issues today.

A True Copy.

COSTS: NO COSTS

Attest:

/s/_____
Deputy Clerk

---

**APPENDIX F**

---

**UNITED STATES COURT OF APPEALS**
**FOR THE SIXTH CIRCUIT**
100 EAST FIFTH STREET, ROOM 538
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

LEONARD GREEN
CLERK

Tel: (513) 564-7000
www.ca6.uscourts.gov

November 22, 2006

Mr. Berle E. Gabbard
3920 Chapman Highway
Knoxville, TN 37920

RE: Case No. 06-5529
*Gabbard v. First Tennessee Bank*

Dear Mr. Gabbard:

We have received the petition for rehearing en banc you submitted in the above case.

Pursuant to Rule 40(a)(1), Federal Rules of Appellate Procedure, a petition for rehearing was due on November 13, 2006. The petition was received on November16, 2006. Therefore, the.petition is untimely and is not accepted for filing. You will not receive any additional correspondence regarding the filing of a petition for rehearing in this case.

Very truly yours,

/s/ _____
Beverly L. Harris
Deputy Clerk

cc: Mr. Jay A. Garrison

## APPENDIX G

**UNITED STATES COURT OF APPEALS**
**FOR THE SIXTH CIRCUIT**
U.S. POST OFFICE & COURTHOUSE BUILDING
CINCINNATI, OHIO 45202-3988

JANICE E. YATES
CHIEF DEPUTY CLERK

TELEPHONE
(513) 564- 7072

December 6, 2006

Berle E. Gabbard
3920 Chapman Highway
Knoxville, TN 37920

RE: Case No. 006-5529, *Gabbard v. First Tennessee Bank*

Dear Mr. Gabbard,

The clerk's office received a "Motion for Relief from Failure to File Appellant's Petition for Rehearing" which challenged the calculation of the 14-day time period in which a petition for rehearing may be filed. The court's calculation of time and its determination that time had expired prior to the clerk's office receiving a petition for rehearing was correct for the reasons that follow in this letter.

The 14-day time period begins to run "after entry of judgment," according to Rule 40. The phrase "entry of judgment" means just that; rehearing time is not calculated according to when the court's decision is received. That

means that the additional three-days for mailing provision of Rule 26(c) by its terms does not apply to a petition for rehearing.

All appellate review which the rules permit has taken place in this appeal and the case is closed. If you want additional review, you will need to seek it from the United States Supreme Court by filing a petition for writ of certiorari.

Sincerely yours,

/s/_____
Janice E. Yates
Chief Deputy Clerk

## APPENDIX H

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF TENNESSEE**
**KNOXVILLE DIVISION**

**Civ. Action No. _____**

**[Filed February 28, 2005]**

| | |
|---|---|
| BERLE E. GABBARD, Plaintiff | ) |
| v. | ) |
| FIRST TENNESSEE BANK, CITY OF KNOXVILLE, TENNESSEE; SIX UNKNOWN OFFICERS OF THE KNOXVILLE POLICE DEPARTMENT (In their Individual and Official Capacities); THE UNIVERSITY OF TENNESSEE MEDICAL CENTER (Psychological Division); JANE DOE (An Employee of the University of Tennessee Medical Center's Psychological Division), Defendants | ) |

### COMPLAINT

This is a Civil Action in which the Plaintiff seeks a jury trial, declaratory judgment, damages, costs, reasonable attorney fees and all other just relief upon Defendants'

violation of Plaintiff's federally protected rights under the Constitution and Laws of the United States and the Constitution and Laws of the State of Tennessee.

## JURISDICTION

This Court hosts jurisdiction pursuant to 28 U.S.C. §§1331 and 1343(a)(3) and (4) to redress deprivations under color of State law of rights secured by the U.S. Constitution, as well as pendent jurisdiction owing to violations of State law.

## PARTIES

1. Plaintiff Berle E. Gabbard is a private citizen, and his address is 3920 Chapman Highway, Knoxville, Tennessee 37920.

2. The Plaintiff, Berle E. Gabbard, is proceeding on the instant cause of action, pro se.

3. Defendant First Tennessee Bank is a financial institution located at 4416 Chapman Highway, Knoxville, Tennessee 37920, and Service Agent for the Defendant Bank is Ms. Lenore Breson, 165 Madison Avenue, 3rd Floor, Memphis, Tennessee 38103.

4. Defendant City of Knoxville Tennessee is a municipality, and Defendants Six Unknown Officers of the Knoxville Police Department are uniformed officers of the municipality's principal law-enforcement agency.

5. Mayor Bill Haslam, City-County Building, 400 Main St., Knoxville, TN 37902, is Service Agent for the

Defendant Municipality and Defendants Six Unknown Police Officers.

6. The Defendant University of Tennessee Medical Center (Psychological Department) is a medical education/treatment department of the Defendant institution, and its Service Agent is General Counsel's Office, University Health System, 1520 Cherokee Trail, Suite 330, Knoxville, Tennessee 37920.

7. Defendant Jane Doe is an employee of the Defendant University of Tennessee Medical Center's Psychological Department, and the Agent for Service on behalf of Defendant Jane Doe is General Counsel's Office, University Health System, 1520 Cherokee Trail, Suite 330, Knoxville, Tennessee 37920.

**STATEMENT OF CLAIM**

8. The Plaintiff, Berle E. Gabbard, is a Knoxville businessman, with business interests in Alabama, Kentucky, Mississippi and Tennessee.

9. Over the years, the Plaintiff has transacted much of his business through Ms. Linda Boyd, an officer of the Defendant First Tennessee Bank (the Bank).

10. On July 16, 2004, the Plaintiff entered the Bank, intent upon securing several thousand dollars in cash, and presented his First Tennessee "First Resource" business card to Ms. Boyd.

11. Upon being told that the Bank could not comply with his request, the Plaintiff stated that there was nothing wrong with the card, explaining that he had paid $50.00 to

extend the life of his previous card from its 2003 expiration date to the 2006 expiration date of the card in question.

12. Ms. Boyd went to check the card again--a card on which the Plaintiff would receive $10,000.00 from the Cumberland Valley National Bank, in Corbin, Kentucky on July 24, 2004.

13. Knowing that he had other valid credit cards in a small canvas bag, the Plaintiff stepped out to his car to retrieve the bag. Upon returning inside the Bank, the Plaintiff was searching through the bag when at least two officers of the Knoxville Police Department arrived.

14. The police had been summoned by employees of the Bank who, not directly involved with the Plaintiff's transaction, had grossly misjudged the situation and overreacted to it.

15. The Plaintiff, shocked and embarrassed, quickly explained that he was searching through his business cards, but the younger of the two officers continued to approach in a manner indicating an intent to restrain the Plaintiff.

16. Stating to the officers that he was trying to protect their jobs, the Plaintiff pointed out that there was absolutely no reason to take him into custody.

17. When the older of the two officers called off the younger officer, saying to him "he's right," a quandary ensued as to how to resolve the matter.

18. The police officers and employees of the Bank expressed concern about detaining the Plaintiff for substance

testing or other evaluation, and the Plaintiff, voicing his objection for the record, volunteered to go to a medical facility for evaluation in order to resolve the matter peaceably.

19. After turning over certain of his personal properties to the older officer for safe keeping, the Plaintiff walked aboard a waiting ambulance.

20. No formal complaint was filed and the Plaintiff was never arrested, read his Miranda rights, hand-cuffed nor in any way restrained by the police or the ambulance personnel.

21. The ambulance drove directly to the Psychological Department of the University of Tennessee Medical Center (Hospital and/or Medical Center) where the Defendant Six Unknown Officers of the Knoxville Police Department (Officers) were waiting when the Plaintiff emerged from the ambulance.

22. With the Defendant Police Officers crowding around him, the Plaintiff walked directly to the nearest men's restroom as the Defendant Police Officers moved to block the door.

23. As the Plaintiff stood before a urinal relieving his bladder, a young, female employee of the Defendant University of Tennessee Medical Center (Psychological Division) entered the rest room and, slipping up behind the Plaintiff with a cup in one hand, thrust her arm between the Plaintiff's legs in an effort to secure a urine sample.

24. The action of Defendant Jane Doe whom the Plaintiff took to be a "Candy Striper," but who seemed to be

in charge, startled and humiliated the Plaintiff, and he demanded to know what she was doing, asking if she was a pervert.

25. With the Defendant Six Unknown Police Officers crowding around to block and control his movement, the Plaintiff was herded to an area where Defendant Jane Doe and other staff persons of the Defendant Hospital' s Psychological Department announced their intention to perform unspecified tests on the Plaintiff.

26. The Plaintiff thereupon stated "I don't want any tests" and asked "do I still have to do it?" When the Defendant Hospital's staff and the Defendant Police Officers answered "yeah," the Plaintiff again stated "Make it a matter of record that I refuse this. Do I still have to do this?"

27. When again the answer was "yeah," the Plaintiff, unwilling to risk physical injury in a futile struggle, opened his arms in a gesture of resignation and surrender.

28. The Plaintiff was strapped down to a hospital bed with both arms tightly secured and injected with unknown drugs that rendered the Plaintiff unconscious.

29. Without a formal complaint, warrant of arrest, arrest, court order, consent by the Plaintiff or any relative, the Defendants reduced Plaintiff's rights to the level accorded to Dr. Josef Mengele's "children," and for the next seven days the Plaintiff was subjected to experimental medicine.

30. The Defendant Hospital, lacking knowledge of the Plaintiff's state of health and/or his tolerance or lack of tolerance towards specific drugs, substances and treatments,

subjected the plaintiff to unknown drugs and unspecified tests against the Plaintiff's expressed will.

31. After being unconscious or having little or no awareness of himself, his location and his condition for some two or three days, the Plaintiff awakened to find that his feet were grotesquely swollen.

32. In the first day of detention, the Defendant Hospital had apparently performed a spinal tap, drawing spinal fluid from the Plaintiff, and in addition to the catheter invading the Plaintiff's bladder, unknown drugs were being administered, not only by IV, but via needles inserted directly into the Plaintiff's belly and stomach.

33. Throughout the seven days of his forced detention, the Plaintiff was isolated in an intensive-care section of the Psychological Ward and kept under 24-hour surveillance.

34. Fearing the loss of his feet and prolonged detention, the Plaintiff dropped all hints of resentment, became cheerful and, remarking to one staff member that he had never received better treatment, feigned his delight at the much-needed rest.

35. The Plaintiff had arrived at the Defendant Hospital on July 16 wearing a pair of Size 9½ Italian loafers, but upon his release on July 23, his feet were horribly swollen to almost twice their size, and the Plaintiff had to conceal them from hospital staff in a pair of Size 12 wrap-around house shoes.

36. Shortly after his release from the Defendant Hospital, the Plaintiff passed out and was unconscious for some seven hours. Blackouts, humiliation and fear for the loss

of his feet have taken a significant toll on the Plaintiff's emotional well-being.

37. Since his discharge, the Plaintiff has suffered from severe pain in his lower legs and feet and massive swelling that resulted in his toe cracking open. The Plaintiff has also suffered pain in his back, severe weakness and symptoms closely mimicking muscular dystrophy.

38. As a direct result of the forced detention and treatment caused and/or carried out by the Defendants, the Plaintiff has been forced to use canes and crutches and has sometimes been unable to get upright from a seated or reclining position without assistance from others.

39. Subsequent to the instant forced detention and experimental treatment, the Plaintiff has been bombarded with fraudulent medical bills, to date, totaling more than $3500.00.

**CLAIMS**

(First Cause of Action)

40. The actions of Defendant First Tennessee Bank, the Defendant Municipality and the Defendant Six Unknown Police Officers, set forth in numerical paragraphs eight (8) through thirty-nine (39), violated 42 U.S.C. §1983 in their illicit combination to suspend the Plaintiff's liberty, thereby denying the Plaintiff due process, fundamental fairness and equal protection, contrary to Amends. 4, 5, and 14 of the U. S. Constitution and Article 1, §8 of the Tennessee Constitution.

41. As reflected by the fact that the two uniformed officers (unnamed as Defendants) found no justification for

detaining the Plaintiff, the Plaintiff was doing nothing illegal. Seeking only to obtain services for which he had duly contracted with the Bank, Plaintiff, acting within his rights, was searching a small bag that contained nothing more sinister than credit cards. The Defendant Bank, in combination with the Defendant Municipality and the Defendant Police Officers, acted arbitrarily and without probable cause to secure the detention and pharmacological and/or psychological evaluation of the Plaintiff.

(Second Cause of Action)

42. Acting under color of State law, the Defendants First Tennessee Bank, City of Knoxville Tennessee, Six Unknown Officers of the Knoxville Police Department, University of Tennessee Medical Center (Psychological Department) and Jane Doe, set forth in numerical paragraphs eight (8) through thirty-nine (39), forced arbitrary and illegal constraints upon the Plaintiff that resulted in his gross humiliation, invasion of his privacy and personal dignity, forced detention and forced treatment, in violation of 42 U.S.C. §1983, Amends. 4, 5 and 14 of the U. S. Constitution and Article 1, §8 of the Tennessee Constitution.

43. The Defendant Bank's unwarranted call to the Knoxville Police Department and the arbitrary and unqualified assessment that the Plaintiff required restraint and/or pharmacological or psychological evaluation was the proximate cause of the Defendant Municipality's involvement and of the Defendant Six Unknown Officers' unlawfully restricting the Plaintiff's liberty and conducting him into the custody of the Defendant Hospital and Defendant Jane Doe.

(Third Cause of Action)

44. In the absence of a court order or any lawful process, Defendants First Tennessee Bank, City of Knoxville Tennessee Six Unknown Officers of the Knoxville Police Department, University of Tennessee Medical Center (Psychological Department) and Jane Doe combined to subject the Plaintiff to illegal detention and malpractice via unwanted, experimental treatment as set forth in numerical paragraphs eight (8) through thirty-nine (39), in violation of 42 U.S.C. §1983, Amends. 4, 5 and 14 of the U.S. Constitution and Article 1, §8 of the Tennessee Constitution.

45. Pursuant to the Defendant Bank's arbitrary and unqualified diagnosis that the Plaintiff required detention and pharmacological or psychological evaluation, the Defendant City of Knoxville Tennessee, failing to train, supervise and/or restrain its Defendant Six Unknown Officers, permitted them to act arbitrarily to provide the forced restraint that subjected the Plaintiff to the humiliating, unwanted, unauthorized and unknown medical malpractice at the hands of the Defendant Medical Center and Defendant Jane Doe, resulting in the painful and debilitating swelling to Plaintiff's feet, the pain and muscular abnormalities in his legs, the pain in his back, the weakness and fatigue throughout his body, the episodic losses of consciousness, and an incalculable freight of emotion pain.

(Fourth Cause of Action)

46. Notwithstanding this Plaintiff's persistent and forceful objections to the illegal actions urged, taken and/or perpetuated by the aforesaid Defendants in numerical paragraphs eight (8) through thirty-nine (39), the Plaintiff was arbitrarily detained and subjected to unwanted examinations,

medications and treatment and subsequently fraudulently billed for those unwanted services and medications, contrary to 42 U.S.C. §1983; Amends. 4, 5, and 14 of the U. S. Constitution and Article 1, §8 of the Tennessee Constitution.

47. The illegal detention and forced treatment imposed by the Defendant Medical Center, have resulted in the Plaintiff receiving numerous billings and threats from debt collectors, intent on collecting payment for service charges generated by the Defendant Medical Center. These fraudulent charges and the attendant debt-collection efforts, caused by the Defendants' actions, have materially added to Plaintiff's emotional distress.

48. The Plaintiff reserves the right to amend this Complaint upon further discovery, to add party-defendants and to add and/or amend causes of action for any persons, accordingly.

**RELIEF**

WHEREFORE, the Plaintiff demands the following relief:

(a) Declaratory judgment against all Defendants upon violations of the Constitution and Laws of the United States and the Tennessee Constitution.

(b) Compensatory Damages against the Defendants, jointly and severally, in the amount of $10,000,000.00.

(c) Punitive damages against the Defendants, jointly and severally, in the amount of $20,000,000.00.

(d) All costs herein expended.

(e) A jury trial upon the merits.

(f) Reasonable attorney fees.

(g) All other just relief.

This the 28th day of February, 2005.

/s/ _____

BERLE E. GABBARD
3920 Chapman Highway
Knoxville, TN 37920
Phone: (865) 579-9142

PLAINTIFF, *pro se*

**VERIFICATION**

I hereby verify under penalty of perjury, pursuant to 28 U.S.C. §1746, that the foregoing facts are true and correct to the best of my knowledge, information and belief.

Executed February 28th, 2005

/s/ _____

BERLE E. GABBARD
PLAINTIFF